NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507283

BRANDY PARKER GEUSZ,
EMPLOYEE — CLAIMANT

WAL-MART STORES, INC.,
SELF-INSURED EMPLOYER — RESPONDENT

OPINION FILED APRIL 13, 2007

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed August 24, 2006. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On July 3, 2005, the relationship of employee-self insured employer existed between the parties.

3. The claimant has failed to prove by the greater weight of the credible evidence that she sustained "compensable injuries" to her back and left shoulder on July 3, 2005.

Specifically, she has failed to prove by the greater weight of the credible evidence that, on that date, she sustained a physical injury to her left shoulder that is supported by objective findings, that arose out of and was in the course of her employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence. She has further failed to prove that, on that date, she sustained a physical injury to her back that arose out of and occurred in the course of her employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence.

4. The respondents have denied the occurrence of any compensable injuries to the claimant's back and left shoulder on July 3, 2005, and have controverted this claim in its entirety.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

The claimant alleges that she sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed

to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the August 24, 2006 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

____

OLAN W. REEVES, Chairman

____

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's decision finding the claimant did not suffer a compensable injury on July 3, 2005 and denying her temporary total benefits and payment of medical expenses related to that injury.

After a de novo review of the record, I find that the claimant gave credible testimony that on July 3, 2005 she suffered an injury to her back and left shoulder after falling off of a six to eight foot ladder at work. The Majority finds that the claimant satisfied the statutory requirement of Ark. Code Ann. § 11-9-

102(4)(D), where a “compensable injury must be established by medical evidence supported by objective findings” in regard to her work related back injury, but that the claimant had experienced some degeneration in her lumbar spine and was not credible. Based on these findings, they found that her back injury was not compensable. The Majority also found that the claimant did not prove that her left shoulder injury was compensable. The Majority finds that there was no mention of bruising, swelling, redness, crepitus, etc. in her medical records. The Majority’s findings are simply not consistent with the objective medical findings of several doctors, medical staff, or with the testimony of the claimant. Existence of an injury is supported by objective evidence such as doctors’ diagnosis of a left shoulder contusion, a member of management’s note of bruising, as well as documented muscle spasms. The Majority’s opinion therefore contains errors of both fact and law. For these reasons, I respectfully dissent.

Claimant testified that on July 3, 2005, she was working in a cooler, loading the top shelf, when she fell off a six to eight foot ladder, hitting her back and left shoulder on a metal shelving unit before hitting the floor. Claimant testified that she laid on

the floor for several minutes, and then proceeded to get up and finish her work, because it was close to the end of her shift. After taking a shower later that evening, the claimant was in so much pain, that she called her cousin, who took her to the Northwest Medical Center Emergency Room. Claimant testified that her cousin called her employer, spoke to a manager, explained what had happened, and informed the manager that she was in the emergency room.

Claimant reported severe pain and muscle spasms in her back. The emergency room medical chart shows that the claimant complained of pain on her entire left side, but that it was most pronounced on her back. In fact, the claimant was prescribed Flexeril for muscle spasms, Ibuprofen for pain relief and inflammation, and Ultram for pain relief. Despite the emergency physician’s notation that the claimant had back pain and muscle tenderness of her back, a CAT scan was performed on her abdomen only. The CAT scan showed no signs of injury, as the claimant’s pain was mainly in her back.

Claimant testified that as soon as an appointment was available she was seen by her primary care physician, Dr. Beth Cuievas, on July 11, 2005. An X-ray was performed and the claimant was instructed to continue taking Ultram and Ibuprofen. Claimant testified

that she was mostly confined to her bed for two weeks and was taken off of work by Dr. Beth Cuievas during that time. Still in pain, the claimant was referred by her employer to the Lowell Medical Center, where she was seen on three separate occasions by two separate physicians, first by Mr. Beasley, a nurse practitioner, and then by Dr. Berestnev.

On July 15, 2005, the claimant was treated by Beasley. There is no mention of bruising in Beasley's notes. A member of management, however, does note that the claimant had bruising at that visit. Claimant was allowed to return to work on light duty and was given a restriction of no lifting over five to ten pounds and advised to take ibuprofen for pain.

Interestingly enough, on her second visit to the Lowell Medical Clinic on July 22, 2005, the claimant met with a different physician, Dr. Berestnev, who did note bruising on the left shoulder and diagnosed the claimant with a lumbar strain. Dr. Berestnev gave the claimant prescriptions for Celebrex and Vicodin to treat pain and muscle spasms. On her third visit to the Lowell Medical Clinic on July 25, 2005, Dr. Berestnev ordered an MRI, because the claimant was still experiencing pain in her left shoulder. However, after this visit, the respondents denied the claimant any more medical.

Still in pain, the claimant went to a different clinic on August 1, 2005 to see Dr. Raben, who ordered an MRI to be taken and prescribed muscle relaxers and pain medication for the muscle spasms in her back and pain in her shoulder. Dr. Raben diagnosed the claimant as having a probable disc herniation and a derangement of the left shoulder. After reviewing the results of the MRI, Dr. Raben diagnosed the claimant as having derangement and stenosis at L3/4 and L4/5.

On August 31, 2005, the claimant was referred to Dr. Kaler, an orthopaedic surgeon and shoulder specialist, who noted that the claimant had a left shoulder contusion. Not only did the claimant complain of bruising, but Dr. Kaler observed that the claimant had a discoloration band and signs of old ecchymosis (bruising) at her junction proximal mid third of her lateral arm. Dr. Kaler also put the claimant on a work restriction, prohibiting her from lifting more than 10-20 pounds.

Dr. Raben prescribed physical therapy. Claimant testified that she did attend physical therapy, but it became too expensive, and she was forced to quit. At the hearing, the claimant testified that she was still having pain in her back and shoulder everyday along with having muscle spasms in her back.

The Majority erred in both fact and law by finding that there were no objective medical findings. The Majority's first error in fact was in finding that there was no evidence of muscle spasms in the claimant's back. The claimant testified that she was suffering from muscle spasms in her back and that she reported these spasms to her doctors. On July 3rd, hours after the accident, the claimant was prescribed Flexeril by the emergency room physician. The doctor's notes clearly states that "this medication is used to relieve muscle spasm." On July 22, 2005, Dr. Berestnev found that the claimant had pain to palpation over the claimant's lumbar spine and paraspinous musculature. In other words, the claimant was in pain when the doctor touched her lumbar spine and spinal muscles. As a result, the claimant was prescribed Celebrex and Vicodin. Also, on August 1, 2005, Dr. Raben's medical notes clearly stated to make sure that the claimant had medication for muscle spasms and inflammation. In addition to the medical records on the claimant's muscle spasms, the claimant was also given prescriptions for Ibuprofen from Dr. Beth Cuievas, Beasley, and Dr. Berestnev for inflammation. It is abundantly clear that the Majority errs as a matter of fact by stating that there was no evidence of a

traumatic event, such as bruising, swelling, inflammation, or muscle spasms.

The Majority also erred as a matter of law, by finding that there were no objective medical findings. The Majority, by affirming the decision of the Administrative Law Judge as their own, reasons the Commission is not held to the same standard of review as the Supreme Court. In fact, the Majority completely fails to consider and ultimately ignores the holdings of Fred's Inc., and Estridge, where medical notes of muscle spasms and prescriptions of muscle relaxers are held to be objective medical findings. See Estridge v. Waste Management, 343 Ark. 276, 33 S. W. 3d 167 (2000), and Fred's Inc. v. Jefferson, 361 Ark. 258, 206 S. W. 3d 238 (2005).

In Fred's Inc. the claimant worked as a stock person. She was retrieving boxes on an aluminum ladder. The ladder collapsed and the claimant fell onto a concrete floor and landed on her back. The claimant complained of having muscle spasms. The claimant was diagnosed with a back contusion/strain. She was later prescribed Vistaril, Lorcet Plus, Flexeril, Prednisone, and Celebrex. She was also prescribed physical therapy. The medical reports contained no notes regarding the

reason for the claimant's prescriptions and physical therapy. See, Fred's Inc.; supra.

The Arkansas Supreme Court affirmed the Commission's finding that the evidence was sufficient to showing objective medical findings. They opined that,

> ...following the logic expressed in *Estridge*, a reasonable inference from the chronology of events is that the medication and physical therapy were prescribed to aid Jefferson and to treat her injury. Any other construction of these events does not withstand scrutiny or pass the test of reasonableness. Id.

The above language is indicative that in a situation where a claimant is prescribed a muscle relaxant when immediately following an injury, objective findings exist. Likewise, in the present case the claimant did present complaints of muscle spasms, and she was given muscle relaxants for muscle spasms. In fact, the doctor's note specifically states that she was given a muscle relaxant for muscle spasms. There is simply no other way to construe that the medication was given for anything else.

When looking at the Estridge case, it becomes even more clear that prescribing muscle relaxants is enough to satisfy that objective findings exist. In Estridge, the claimant reported a back injury after carrying and nearly dropping a railroad tie. He was diagnosed with a low back strain and radicular pain. The claimant was

further prescribed Valium, "as needed for muscle spasms." The Arkansas Supreme Court found that the claimant did have objective medical findings. This decision was in part based on the fact that the claimant received muscle relaxants. The Court indicated that, "A doctor would not prescribe medication directed to be taken 'as needed for muscle spasm' if he did not believe muscle spasms were existent." This language is indicative that even in a situation where the claimant does not complain of having muscle spasms, but where medication is prescribed to treat them, objective findings exist.

In the present case, there is no dispute that the claimant was prescribed muscle relaxers on July 3, 2005 the day of the accident. In fact, it is noted by the emergency room physician, that the muscle relaxer is for the relief of muscle spasms. Likewise, Dr. Berestnev found that the claimant had pain to palpation over the claimant's lumbar spine and paraspinous musculature and prescribed Celebrex and Vicodin. Furthermore, Dr. Raben's medical notes stated to make sure that the claimant had medication for muscle spasms and inflammation.

In both Estridge and in Fred's Inc., the Court found the claimant had shown objective medical

findings. In particular I note the language contained in Fred's Inc. in reference to the claimant's medication indicating, "Any other construction of these events does not withstand the scrutiny or pass the test of reasonableness." In fact in Estridge, the court opines that to conclude that the instruction to take Flexeril "as needed for muscle spasm" as not being proof of an objective finding was absurd. In the present case, the claimant was prescribed Flexeril to take to "relieve muscle spasm." As such, under Estridge, the only conclusion is that the claimant had objective findings in the form of muscle spasms. Finally, I find that the evidence in this case is even more clear than in Fred's or Estridge, in that the claimant complained of muscle spasms as did the claimant in Fred's, was given medication for muscle spasms as did the claimant in Estridge, and the doctor's note proclaimed that the medication was for the claimant's muscle spasms. It is therefore evident in this case that the claimant had objective medical findings.

The Majority also erred as a matter of fact in finding that the MRI results of the claimant's back were consistent with degenerative changes, and therefore not related to the fall. In making this

finding, the Majority speculates that the degenerative changes would not be unusual for an individual of the claimant’s age and weight, and would not be particularly indicative of any recent specific trauma.

I must reject the view of the Majority. While no physician specifically relates the findings of the MRI to the claimant's compensable injury, such proof is not required. See, Wal-Mart Stores Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

The MRI, which was ordered by Dr. Raben, showed that the claimant has disc desiccation, mild disc space narrowing, and mild diffuse annular bulging at L3-4. At L4-5, there was disc desiccation with minimal annular bulging. This is consistent with the claimant’s injury. The claimant is only 27 years old and has had no history of recurring treatment for her back. Likewise, there is nothing from the MRI to indicate degeneration caused her to have a bulging disc or derangement and stenosis. The claimant’s MRI did not indicate that her degeneration was severe or unusual for her age. Furthermore, she only had derangement and stenosis at two levels, which is not consistent with degeneration, which is usually seen consistently throughout the spine.

After the MRI, Dr. Raben diagnosed the claimant as having derangement and stenosis at L3/4 and L4/5. Claimant had never been diagnosed with derangement or stenosis or any other back related problems prior to falling off of the ladder at work. If the claimant’s injuries were pre-existing and related to the claimant’s age and weight, claimant would most likely have been treated for some back pain prior to the accident. Even though the claimant reported some previous back pain occurring for one month before the accident, it was apparently not severe enough for the claimant to seek medical attention. As she had never been treated for back pain prior to the accident, the Majority is impermissibly speculating that the derangement and stenosis are not related to the compensable injury. As such, the Majority errs as a matter of fact in finding that the derangement and stenosis in the claimant’s back are not related to the fall.

Consistent with the claimant’s fall and diagnosed back injury, it is apparent that the claimant also sustained a shoulder injury as shown by bruising. The Majority again errs by finding that there were no objective findings of a shoulder injury.

In the present case, on the claimant’s first visit to the Lowell Medical Clinic on July 15, 2005, a member of management’s describes signs of injury as “bruising.” In Continental Express, a physical therapist noted the existence of muscle spasms. Continental Express, Inc. v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999). The Court indicated that a physical therapist’s opinion or observations of such were sufficient in showing the spasms did exist. Id.

Likewise, in the present case the claimant did present complaints of bruising, and a member of management specifically found “bruising” on the claimant. On July 15, 2005, a respondent manager named “Pat (illegible)” completed a portion of the worker’s compensation request for medical care. The form includes language asking for “Description of injury / Part of body injured.” To the right, there is handwriting that indicates, “Bruises.” This form is signed by the member of management. It is apparent by looking at this note that the handwriting of the manager is the same as the handwriting indicating “Bruises.” As such, there is simply no way to conclude that the member of management did not see bruises. Pursuant to the rational of Continental Express, I find that despite the fact that the member of management was

not an expert, her observance of bruising shows the existence of objective findings directly related to the claimant’s fall.

The Majority also argues that the emergency room made no mention of any bruising on the claimant, and that a person of her size and weight would most certainly have bruising immediately after the accident. It is interesting that the Majority plays “doctor” and makes a medical opinion without having a medical license. It is true that the emergency room notes do not mention bruising, but there was no testimony presented which would indicate how long it would take a bruise to form. Common knowledge would indicate that it may take up to a day or more for a bruise to appear. I find that the Majority erred in drawing medical conclusions without specific medical evidence.

The Majority also ignores the bruising noted by several doctors. On July 22, 2005 Dr. Berestnev found that the claimant had a left shoulder contusion. As noted by the Arkansas Supreme Court in Meister, a contusion is defined as “any injury (usually caused by a blow) in which the skin is not broken” and also as “an injury in which the skin is not broken but underlying blood vessels are disrupted, causing hematoma under the skin.” (internal citations omitted)

Meister v. Safety Kleen, 339 Ark. 91, 3 S.W.3d 320 (1999). Basically, Dr. Berestnev found that the claimant had a bruise on her left shoulder. The claimant was placed on a restriction from lifting items over 10 pounds. Dr. Berestnev later ordered an MRI of the shoulder, which was subsequently cancelled because the Respondents refused to pay for it.

Dr. Raben also diagnosed a probable derangement of the left shoulder. As a result, Dr. Raben ordered an MRI and physical therapy and prescribed medication for pain, spasms and inflammation. After reviewing the MRI results, Dr. Raben found no evidence of an abnormal left shoulder.

Dr. Raben, however, referred the claimant to Dr. Kaler, an orthopaedic surgeon and shoulder specialist, who noted that the claimant had a left shoulder contusion. Dr. Kaler's notes mention that the claimant had complained of bruising, and that he actually observed the discoloration band and old ecchymosis (bruising) on the lateral left arm. Dr. Kaler placed the claimant on a restriction from lifting items over 10 pounds.

The Majority seems to argue that because no other doctor had seen any evidence of bruising and the bruising was on the lateral arm, the bruises are

suspicious. This is clearly an error of fact as one member of management and several doctors noted bruising throughout the claimant's medical records. Furthermore, the fact that the old bruising occurred on the claimant's lateral arm, rather than her shoulder, is not indicative that the claimant did not injure her left shoulder by falling off the ladder. Rather it proves that the claimant did suffer an injury to the left side of her body and bruising was apparent.

Curiously, the Majority argues that on the claimant's repeated physical examinations, there were no objective findings generally attributable to a recent acute traumatic event, such as bruising, swelling, inflammation, or muscle spasm. This is just plain error of fact by the Majority. The Majority relies on the fact that the MRI showed that the claimant's shoulder was normal. The doctors, however, did not use the MRI as a determining factor in whether there was a contusion, because the physicians saw the bruising on their own without the assistance of the MRI. The MRI was subsequent to the bruising to determine if there was substantial internal damage to the shoulder. The claimant is not required to show she had a substantial injury. Rather, she is only required to show objective evidence of an injury, including

diagnostic testing to determine the severity of the injury. Accordingly, Respondents are liable for all medical treatment associated with that injury. As such, the Majority erred in finding that there was no evidence of bruising. I find that the claimant sustained a compensable injury to her left shoulder, which is evidenced by the member of management's and physicians' objective findings of bruising on her left shoulder.

Finally, I address the Majority's argument that the claimant was not credible. The Majority first argues that the claimant is not credible because she did not immediately report back and shoulder problems. The Majority argues that the records themselves are proof that the claimant voiced no opinion about back or shoulder pain which is why the hospital only provided extensive testing on the claimant's abdomen. This is clearly an error of fact. On Claimant's Exhibit 5, the nurse at the hospital makes several important notations on the document. First, on the picture of the human body, the mid to lower back is clearly indicated as the point of pain. Second, the nurse checked off all parts of the body which seemed normal. The nurse, however, drew a line through the word "BACK," indicating that the claimant's back did not pass a normal inspection.

Third, the nurse's notes indicate "musculoskeletal back pain." If the claimant had not complained about back pain, it would not have been noted by the nurse in her medical records.

It is also important to note that the hospital did perform a pelvic exam and found nothing. The Majority assumes that the hospital believed that the majority of the claimant's pain was in her abdomen, which is why a pelvis was performed. This is simply not true. Claimant had previously suffered from cervical cancer. The hospital knew to immediately examine the claimant's pelvic area because she has a medical history of problems in that area of her body. This does not prove that claimant did not suffer from back pain at the time she went to the hospital. Therefore, it is abundantly clear that the claimant did in fact suffer from and report severe back pain when she initially went to the hospital, and that the Majority is wrong in its assertion of fact that the claimant made no complaints of anything other than abdominal pain when she went to the hospital.

The Majority also errs in finding that the claimant did not complain of shoulder pain because it simply not exist. Claimant, however, testified that her back was in so much pain at that time, that she did not

complain about the shoulder pain. Furthermore, she began complaining shortly thereafter.

The Majority also completely dismisses the claimant's mention of back and shoulder pain to Dr. Beth Cuievas on July 11, 2005 and Beasley on July 15, 2005. Dr. Cuievas diagnosed the claimant as having possible torn rib cartilage. It is abundantly clear that the claimant complained of pain in both her back and shoulder, because it led Dr. Cuievas to look at the ribs for a possible solution. Ribs are located in the upper and the mid back, and torn rib cartilage could affect the overall feelings in both the back and the shoulders. I find that the Majority incorrectly assumes that claimant could not have complained of back or shoulder pain if the doctor thought that she might have torn rib cartilage. Also, in Beasley's notes it clearly states, "Assessment: Fall injuries: left shoulder, thoracic spine, left rib pain and lower quadrant abdominal pain." Clearly, claimant complained of left shoulder and back pain at this visit, or it would not have been in the nurse practitioner's assessment.

I find, the Majority errs in finding that the first mention of claimant's back pain was on July 25, 2005. The evidence presented clearly shows that the claimant complained about back and shoulder pain when

she went to the emergency room on July 3, 2005, to Dr. Beth Cuievas on July 11, 2005, and to Beasley on July 15, 2005. The Majority's finding that she did not complain of back pain until July 25, 2005 is an error of fact and should in no way effect the claimant's credibility.

Second, I address the Majority's finding that the claimant did not show that the fall actually occurred at work. Claimant testified truthfully that no one witnessed the accident, and she should not be deemed "not sufficiently credible" simply because she told the truth. It is not the claimant's fault that no one witnessed the fall. I find that the old adage still holds true that "if a tree falls in the woods and no one is there to hear it, does it make a noise?" The Majority wrongly assumes that just because no one witnessed the accident that it could not have happened. Rather, I find that the claimant did fall at work, was treated for her injuries that same night, and reported that her injury occurred at work. In fact, the claimant's injuries are consistent with her testimony regarding the accident, and the claimant consistently and repeatedly complained of the same injuries.

Third, I address the Majority's finding that after the claimant's initial visit to the emergency room, she

did not immediately see her primary physician, Dr. Beth Cuievas, as was requested. Claimant testified that she went to Dr. Cuievas as soon as she was able to get into her office for an appointment. Claimant has no control over her physician's appointments or scheduling. She saw her doctor as soon as was possible. Claimant should not be penalized for the inability of her doctor to immediately see her. I find that the Majority erred in finding the claimant at fault for not seeing her doctor immediately.

Fourth, I address the Majority's finding that the claimant is not credible because her story changed every time that she went to the doctor. It seems that the Majority should have more of a problem if the claimant used the exact same words and phrasing every time she went to see a different doctor. Of course, she relayed the same story to every doctor because she was being honest and forthright with them all, but she did not have to use the exact same words and phrasing every single time. In fact, the claimant consistently complained of the same injuries and consistently relayed the same events which led to her injury. It appears that the Majority would find that in order to be credible, the claimant would first have to rehearse her story and repeat it word for word each and every

time. I find that the Majority is completely erroneous in making such demands of the claimant in order for them to find her to be credible.

Claimant establishes that the accident did in fact happen. Most importantly, the objective findings by the physicians are consistent with her testimony about the injuries that she sustained at work. Claimant testified that she hit her back and left shoulder on the metal shelving unit. Several doctors diagnosed the claimant with a left shoulder contusion. Also, the claimant was diagnosed has having derangement and stenosis at L3/4 and L4/5. This evidence corroborates the claimant's testimony about her accident and her injuries. It is clear that the claimant established proof by a preponderance of the evidence that she sustained an injury on July 3, 2005 which arose out of and in the course of her employment, and I therefore find that the claimant's testimony is credible.

For the aforementioned reasons, I must respectfully dissent.

____

PHILIP A. HOOD, Commissioner